



Commonwealth of Massachusetts State Ethics Commission

One Ashburton Place, Room 619, Boston, MA, 02108
phone: 617-727-0060, fax: 617-723-5851



CONFLICT OF INTEREST OPINION EC-COI-02-1

INTRODUCTION

You are a real estate broker. You served on a Town (Town) task force and participated in the process leading to the Town's selection of the developer for a location in the Town (Site) and the imposition of restrictions on the Site's development. The developer and the Town entered into a purchase and sale agreement (P&S), incorporating the restrictions that remains open because the transaction between the developer and the Town has not yet closed.

QUESTION

May you receive private compensation from, or act as agent for, the developer to assist it in complying with the development restrictions, including finding initial buyers or renters of retail space at the Site, when you participated as a municipal employee in the process that led to the selection of the developer and the imposition of the restrictions?

ANSWER

No. Section 18 of G.L. c. 268A will prohibit you from receiving compensation from, or acting as agent for, the developer to assist it in complying with the restrictions imposed by the Town, including finding initial buyers or renters of retail space at the Site, because your compensation would be in connection with the same matter in which you participated as a municipal employee and which remains of direct and substantial interest to the Town.

FACTS

At all relevant times, you have been a Town resident and a professional real estate broker. You have worked full time as a broker at a company specializing in the brokerage of real estate for retail use.

For many years, the Town has been concerned about the use of a now-closed landfill site in Town. Your involvement in this matter began when you served on the Town's Advisory Committee (Advisory Committee), which was composed of individuals the Town Manager appointed. The Advisory Committee was created to help review the work of consultants hired by the Town concerning the Site and to consider the Site's marketability and potential use.

Among other things, the Advisory Committee reviewed and made recommendations for revisions to the Town's Request for Proposals (RFP), which the Town's professional staff prepared and the Town Manager issued. The Advisory Committee also reviewed a due diligence

report about various matters such as drainage, compaction and bearing capacity, which the Town's consultant engineers prepared. Finally, the Advisory Committee interviewed both of the developers who had responded to the RFP, Developer X and Developer Y. The Town Manager recommended that both responses be rejected and the Town's Board of Selectmen (Selectmen) so voted. As a result, the process "went back to the drawing board."

In starting over, the Selectmen created a new advisory group, the Task Force (Task Force), which replaced the Advisory Committee. Most of the Task Force's members had, like you, been members of the Advisory Committee. The Task Force was established to advise the Town Manager and the Selectmen about offering the Site again to potential developers. First, the Task Force reviewed and approved an RFP for a real estate agent to market the Site. The Town Manager issued the RFP, which elicited two applicants, Applicant A and Applicant B. The Task Force interviewed both applicants and recommended Applicant A, which was awarded the contract.¹

Applicant A revised the due diligence report, which had been previously reviewed by the Advisory Committee, to make it more "user-friendly" to potential developers and solicited responses to a new RFP for the development of the Site. As with the earlier RFP, the Task Force reviewed and commented upon the new RFP and on the revised due diligence report. Applicant A completed, then issued an "Offering Package *And* Request for Proposals." Ten developers responded to the new RFP.

The RFP includes a description of "Project Objectives" stating that the Site has "tremendous potential for uses such as office, research and development, biotechnology, hotel, or mixed use development, including retail components." The RFP describes the "General Acquisition and Development Terms." That section of the RFP expressly states that the selected developer and the Town will enter into an acquisition agreement. Further, the section states, "[t]he Town understands that there may be some changes in the development plans as they are refined in detail, but the Town expects that the development actually undertaken on this site by the selected developer will be *substantially the concept presented by the developer in the proposal submitted in response to this Request for Proposal.*"² The Town . . . "is prepared to be an active partner with the selected developer in this project and will seek to work to achieve mutual goals regarding this site." Throughout the RFP, it appears that the Town has emphasized the potential development of the Site for various commercial uses, rather than as land to be kept vacant. Indeed, the RFP states, "[t]he Town will not accept any proposal whose purpose is merely to hold the site vacant or underutilized for purposes of land speculation."³

In the RFP's "Bidding Information" section, there are specific and detailed requirements about the developer's qualifications. In addition, any proposal "will contain a full description of the proposed development and management concept, including: type or types of proposed use or uses; . . . nature of the development concept, including number and heights of buildings, total aggregate developed square footage, total square footage in each building, footprint and floorplate sizes, mixture of uses by building or among buildings, parking supply and arrangement, open space and other amenity features; together with a schematic site plan." In addition, the proposal must contain "an explanation as to the Proponent's view of the market demand and absorption rates for the proposed development." Other conditions include the

Town's reserving the right not to select a proposal for any reason that is in the best interest of the Town. Under the "Evaluation Criteria" section, the Town specified that it will consider goals such as maximizing the tax income from the site and maximizing the "employment of the site consistent with the demographic characteristics of the Town."

The Task Force offered ten applicants an opportunity to present their proposals and to respond to questions before an open meeting. Developer X's proposal proposed a mixed-use development consisting of a hotel; restaurant; store; cinema and an office building.⁴ The proposal states that Developer X has studied the information provided in the RFP and agrees to all the terms and conditions contained therein. The proposal contains a Conceptual Site Plan. This Conceptual Site Plan is attached to the P&S subsequently entered into between Developer X and the Town. The proposal also contains a Project Schedule that is based on information contained in the RFP. Finally, in the Benefits of the Proposed Development Plan section of its proposal Developer X states that "[w]e recognize the significance of the parcel to the residents of the Town . . . and have attempted to give form to their objectives and goals." As a member of the Task Force, you reviewed Developer X's proposal.

Based upon the proposals and the interviews, the Task Force recommended three candidates to the Selectmen and ranked them in the following order: (1) Developer AA; (2) Developer BB; and (3) Developer X. You supported the recommendation of these three, but ranked all three candidates equally. The Selectmen's liaison to the Task Force insisted on adding a fourth candidate, Developer CC. The Selectmen interviewed all four candidates. The members of the Task Force were present during these interviews, which were conducted in public session, but did not take part in the interviews. The Selectmen voted to approve the same three candidates that the Task Force had recommended and voted to rank them in the same order.

Negotiations with the first two candidates were unsuccessful, thus, the Selectmen negotiated and executed a P&S with Developer X. The P&S specifies a closing date for Developer X to purchase the property on [deleted], or thirty days after all required permits for the Site's development have been issued and all appeals of the permits have been completed.

Among the conditions in the P&S are the following obligations on Developer X's part: it shall develop [the Site for mixed commercial/retail use].

The P&S explicitly states that, "Developer X . . . acknowledges that the Town has selected it as developer of the Premises based in part on its proposed use of the Premises, and that the initial use of the Premises shall be substantially as set forth in the development scheme presented to the Town's Board of Selectmen and described [in an exhibit attached to and made a part of the P&S]." The exhibit included in the P&S, is "Developer X's Initial Development Proposal" and depicts the overall layout, including parking areas, cinema, office, retail, restaurant, and hotel.

You last acted as a member of the Task Force on the night of the Selectmen's vote in November 1998, when you sat in the audience with your fellow Task Force members. You did not attend any meetings or do anything as a member of the Task Force thereafter. You did not, however, formally submit your resignation from the Task Force until June 2000.

In June 2000, Developer X initially called you to ask if you, in your capacity as a real estate broker, would assist it in finding businesses to which Developer X could sell or rent retail space on the Site.⁵ Specifically, the scope of services would involve marketing space for a hotel, a restaurant and miscellaneous other retail uses. Developer X solicited you because of your general professional expertise and your specific knowledge about the Site. You would like to be able to represent Developer X in finding prospective buyers and/or tenants for the Site. You note that your work for Developer X would not require you to solicit the Town as a buyer or tenant, nor will you have any reason to lobby the Selectmen, the Town Manager or any other Town officials on Developer X's behalf. All of your work would be aimed at soliciting private parties to purchase and/or lease retail space at the Site from Developer X.⁶

DISCUSSION

As a former member of the Advisory Committee and the Task Force, you are a former municipal employee⁷ for purposes of the conflict-of-interest law. Section 18 of G.L. c. 268A prohibits a former municipal employee from "knowingly act[ing] as agent⁸ or attorney for or receiv[ing] compensation,⁹ directly or indirectly from anyone other than the same . . . town in connection with any particular matter¹⁰ in which the . . . town is a party or has a direct and substantial interest and in which he participated¹¹ as a municipal employee while so employed"

In describing the purposes behind the restrictions governing former state, county or municipal employees, the Commission has emphasized that the undivided loyalty due from a public employee while serving continues with respect to some matters after they leave public service. Moreover, the restrictions on former employees help to prevent present employees "from making official judgments with an eye, wittingly or unwittingly, consciously or subconsciously, toward [their] own personal future interest."¹² One of the purposes "is to bar . . . former employees, *not* from benefiting from the general subject-matter expertise they acquired in government service, but from selling to private interests their familiarity with the facts of particular matters that are of *continuing concern* to their former government employer."¹³

We begin our analysis by identifying the relevant particular matter. You argue that the relevant particular matter is the P&S alone and that you did not participate in negotiating the P&S. We conclude, as discussed below, that the RFP and the P&S together compose a particular matter for § 18 purposes.¹⁴ Thus, we conclude that your actions on the Task Force constituted participation in the P&S.¹⁵

The P&S is the contract between the Town and Developer X and is the consummation of the development scheme contained in Developer X's proposal in response to the RFP. The types of retail uses contemplated and described in general conceptual terms in the RFP are described in specific detail in the P&S. The RFP required Developer X to submit a proposal specifying the "type or types of proposed use or uses; [and] nature of the development concept together with a schematic site plan." An Exhibit to the P&S depicts such a schematic site plan. The P&S sets forth the specific detail of the schematic plan contained in the proposal. For example, the P&S

provides for development of an office building and a retail facility. The P&S does not depart from the development concepts contained in the RFP and Developer X's proposal, but, rather, provides the specific details and requirements necessary to implement those concepts.

In short, the contract between Developer X and the Town includes not only the P&S document but also the proposal Developer X submitted in response to the RFP. In selecting Developer X, the Town relied on Developer X's detailed proposal, much of which is incorporated in the P&S. The basic terms of the Site's development were established by the RFP. Based upon our review of the RFP and P&S, we cannot differentiate the RFP as being a particular matter separate and distinct from the P&S.¹⁶ Accordingly, we conclude that the RFP and the P&S are part of the same particular matter, i.e. the same contract, for purposes of § 18.

Here, you participated, in your former capacity as a member of the Advisory Committee and the Task Force, in the process that led to the Town's selection of Developer X as the Site's developer and the imposition of the development restrictions. You reviewed and made recommendations for revisions to the original RFP; you interviewed the developers, including Developer X, who responded to the RFP; you reviewed the development proposals; you reviewed the due diligence report concerning the Site; you reviewed and commented on the revised due diligence report and the new RFP for the use of the Site; you participated in an open meeting, heard proposals from and interviewed developers, including Developer X, who responded to the new RFP. Based on your review of the proposals and the interviews, you recommended Developer X to the Selectmen. Most significantly, you reviewed and approved Developer X's specific proposal for the Site that forms the basis of the P&S. Thus, because you participated in the process, reviewed Developer X's proposal, interviewed Developer X and recommended it to the Selectmen as the developer, you participated, personally and substantially, in the P&S.¹⁷ It is not necessary for one to be the final or ultimate decision-maker to have participated personally and substantially in the decision.¹⁸

Next, we consider whether your compensation from Developer X would be "in connection with" the particular matter in which you participated as a municipal employee. For the following reasons, we conclude that it would be.

Our analysis begins with the plain meaning of the statutory language.¹⁹ The word "connect" commonly means "[t]o join, fasten, or link together."²⁰ The Commission's analysis has varied in previous opinions in determining whether a former public employee's present work for private compensation is "in connection with" a particular matter in which he participated as a public employee. The relevant language must be interpreted in light of the purpose of the statute, while recognizing that the legislature did not intend to foreclose entirely the former public employee's private employment in the very area of his greatest expertise.²¹ The Commission has determined that an "analysis of factors showing whether the employee's proposed private work is closely enough connected to the matter in which he participated to bar him from acting as agent or attorney or receiving compensation" is in accord with the statutory language.²²

In determining whether one's compensated private work is specifically linked to the relevant particular matter, the Commission has reviewed various factors such as "whether the private work on the new particular matter is 'integrally related' to the government matter because they involve 'the same parties, the same litigation, the same issues or the same controversy.'"²³

For example, the later stage of the same environmental review process culminating in an environmental impact report involves the same controversy.²⁴ In contrast, if the issues have changed substantially, the Commission has viewed the new matter as not specifically connected to the matter in which the employee participated.²⁵

Additionally, the Commission examines the effect the proposed private work for the non-state party would have on the particular matter in which the former employee participated. "This factor seeks to guard against potential abuse of past factual knowledge, confidential information, and personal associations in the context of the particular matter."²⁶

It remains for us to apply this analysis to your circumstances. As a municipal employee, you reviewed and approved a development scheme for the Site, whose concepts were incorporated in the P&S. One of the concepts was that the Site was to have a retail component. Thus, Developer X seeks to privately compensate you to assist it in complying with that component by finding retail tenants for the Site.

Thus, you now seek to be privately compensated by Developer X, in essence, to implement the same development scheme that you approved and participated in as a municipal employee. Further, the Town is a party to the P&S and has a continuing interest in the development of the Site, at least until the deal closes. Based on these circumstances, your work for Developer X would be, for purposes of § 18, "in connection with" the same particular matter in which you participated as a municipal employee. You may not receive compensation under such circumstances because a municipal employee may not privately profit from a matter in which he participated. In this particular matter you owe undivided loyalty to the Town. While we are mindful that there is no evidence that you intended to create a future private opportunity for yourself, the conflict law is designed to have a prophylactic effect by prohibiting even the appearance of dual loyalties to one's municipality and to one's future private business interests.²⁷

Further, you would be performing such private services for Developer X during the time before the transaction between the Town and Developer X closes. Although it does not appear that you would be paid to undermine or take advantage of a weakness in the particular matter in which you participated, your work could affect Developer X's ability to close the transaction because its ability to find tenants and/or buyers could change the economics of the deal. Thus, you could be placed in a situation of conflicting loyalties to the Town and to Developer X, your private client. For example, if Developer X were unable to locate retail tenants and/or buyers it could abandon the deal.

Accordingly, based on all of the circumstances, we conclude that, § 18 of G.L. c. 268A will prohibit you from receiving compensation from, or acting as agent for, Developer X to assist it in finding initial buyers or renters of retail space at the Site, because your compensation would be in connection with the particular matter in which you participated as a municipal employee and which remains of direct and substantial interest to the Town.²⁸

DATE AUTHORIZED: January 31, 2002

¹ You emphasize that neither the Task Force nor its predecessor, the Advisory Committee, had the authority to bind the Town to any contracts.

² Emphasis added.

³ The RFP includes detailed information about the commercial market in the area near the Site.

⁴ You have provided a copy of Developer X's proposal for our review.

⁵ You do not recall whether Developer X approached you before or after you formally submitted your resignation from the Task Force.

⁶ You also note that your knowledge of the Site, although acquired through your work on both the Advisory Committee and the Task Force, stems from publicly available information. According to you, any other real estate broker could obtain the same level of knowledge of relevant information by reading the due diligence materials the Town's consultant produced and by reviewing the minutes of the meetings of the Task Force and the Selectmen, all of which are public records. You would not use any confidential information you may have acquired through any of your former positions with the Town.

⁷ "Municipal employee, a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis," G. L. c. 268A, § 1(g). We conclude that the Advisory Committee and the Task Force are "municipal agencies" as defined and interpreted under the conflict-of-interest law because of the role they played as an instrumentality serving the Town. *See e.g., EC-COI-95-3.*

⁸ The State Ethics Commission has concluded that "the distinguishing factor of acting as agent within the meaning of the conflict law is 'acting on behalf of' some person or entity, a factor present in acting as spokesperson, negotiating, signing documents and submitting applications." *In re Sullivan*, 1987 SEC 312, 314-315; *See also, In re Reynolds*, 1989 SEC 423, 427; *Commonwealth v. Newman*, 32 Mass. App. Ct. 148, 150 (1992).

⁹ "Compensation, any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another." G.L. c. 268A, § 1(a).

¹⁰ "Particular matter, any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property." G.L. c. 268A, § 1(k).

¹¹ “Participate, participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.” G.L. c. 268A, § 1(j).

¹² *EC-COI-99-1* (Discussing § 5, the state counterpart to § 18).

¹³ *EC-COI-92-17* (emphasis added); *see also EC-COI-99-1; EC-COI-93-16; EC-COI-95-11. In re Wharton*, 1984 SEC 182, 185.

¹⁴ To determine *when* instruments deriving from a given transaction should be read together, case law considers the simultaneity of execution, identity of subject matter and parties, cross-referencing, and interdependency of provisions. *Chelsea Industries, Inc. v. Florence*, 358 Mass. 50, 55-56 (1970); *Gilmore v. Century Bank & Trust Co.*, 20 Mass. App. Ct. 49, 56 (1985).

¹⁵ *See EC-COI-99-1* (state employee who had participated in the RFP process to find qualified vendors for a state blanket contract also had participated in the resulting contract, for purposes of § 5, the state counterpart to § 18).

¹⁶ *EC-COI-99-1. See also EC-COI-93-16* (former state employee who had participated in creating RFP could not receive compensation from a private entity in connection with the contracts his former state agency awarded to that same entity pursuant to the RFP).

¹⁷ *See EC-COI-93-16* (“the proper focus is on the degree of participation in the contracting process, rather than on the stage of the process in which the participation occurs.”). *Contrast EC-COI-82-82* (former state employee not barred under § 5(a) where he had no role in formulating RFP, he attended informational meetings that were not part of the selection process, and he dissociated himself from any participation in the selection process).

¹⁸ *EC-COI-98-3*.

¹⁹ *Int’l Organization of Masters, ect. v. Woods Hole, Martha’s Vineyard & Nantucket Steamship Authority*, 392 Mass. 811, 813 (1984) (“The intent of the legislature is to be determined primarily from the words of the statute, given their natural import in common and approved usage, and with reference to the conditions existing at the time of enactment. This intent is discerned from the ordinary meaning of the words in a statute considered in the context of the objectives which the law seeks to fulfill.”).

²⁰ *Third New International Dictionary* (1993). *See also Black’s Law Dictionary* (Fifth Ed.) (“[t]o establish a bond or relation between.”).

²¹ *EC-COI-92-17. See also EC-COI-81-34* (quoting Jordan, *Ethical issues Arising from Present and Past Government Service*, in *ABA, Professional Responsibility: A Guide for Attorneys* 196 [1978]).

²² *EC-COI-92-17*.

²³ *EC-COI-92-17*.

²⁴ *EC-COI-89-7*. See also *EC-COI-81-45* (“[A] follow-up ruling involving the same set of operative facts, . . . a fresh phase of an earlier proceeding, or . . . a subsequent renewal in what is essentially a continuing controversy should each constitute the same [‘particular’] matter as the earlier situation.”).

²⁵ See e.g. *EC-COI-89-34*, n.5 (different legislative proposal); *EC-COI-85-74* (different buildings using changed plans); *EC-COI-83-80* (new alternatives, studied independently, for construction project).

²⁶ *EC-COI-92-17*.

²⁷ Public employees and appointing authorities should be mindful that serving, or appointing one to serve, in a public capacity, even for no compensation, may have significant consequences on an individual’s private business interests. Prior to accepting or making an appointment to a committee, such as the Task Force, the appointing authority and the appointee should consider the practical implications of the appointment and the nature of the committee’s work on the appointee’s private business interests. If one is interested in subsequently performing private work on a project, one should not serve on such a committee.

²⁸ You may be able to receive private compensation from Developer X after the transaction between Developer X and the Town closes, depending on whether the Town continues to have an enforceable interest in the development restrictions on the Site. For example, if the Town no longer has an enforceable interest in the development restrictions, you may be able to receive private compensation from Developer X to assist it in finding secondary buyers or renters of retail space at the Site.